IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-622

KENNETH A. BODE, ET AL., *Petitioners,*

v.

NATIONAL DEMOCRATIC PARTY, ET AL., *Respondents.*

REPLY MEMORANDUM FOR PETITIONERS AND MOTION TO EXPEDITE

The Opposition filed by the Democratic National Committee seems to underscore rather than to refute the necessity for an authoritative ruling by this Court on an issue of manifest national import. While arguing that the lower court's decision reaches the right result, the Opposition does not even purport to answer

our principal ground for review: *That the boundary between the permissible and the forbidden in the nomination of candidates for the nation's highest office should clearly emanate from the nation's highest Court.* Not only this, but even respondents' limited "right result" contention is wholly lacking in credence:

1. The principal contention made by the Committee in defense of its formula before this Court is one which the Court of Appeals did *not* accept. As respondents now state it, their use of a debased population formula [1] for allocating 54 per cent of the delegate strength advances the "twin goals of electoral success and party organization and morale" (p. 12). But nowhere in the opinion below is the Committee's "electoral success" argument espoused—probably because the argument is so plainly fallacious. Thus, while respondents state that their formula is saved by the Party's interest in "the selection of a candidate *who can be* elected" (p. 15), it is obvious that a fairly apportioned convention representing Democratic strength among the states is just as capable of selecting a candidate who can be elected by the Electoral College as a malapportioned convention. But whether this or some other reason impelled the Court of Appeals not to adopt the "electoral success" argument which our opponents so strenuously press, the notable fact is that this Court is being asked without briefing and argument to accept the challenged delegate

[1] As pointed out in the petition for certiorari (p. 13, n. 5), the Electoral College formula is even a debasement of the population formula, for, by adding two Senators in determining each state's representation, the voting strength of residents of smaller states is systematically inflated.

formula on a quite different rationale from that which the Court below has espoused.[2]

2. Respondents state that their formula is not challenged as being invidiously discriminatory "against any identifiable group within the party, such as Blacks, women, or young people" (p. 14). But if, as is clear, the challenged formula discriminates against Democrats in the states being under-represented, these Democrats surely are an "identifiable group within the party." Indeed, since they are chiefly the Democrats in the larger industrial states with urban and minority group concentrations, it is clear that the formula *does* in effect discriminate against Blacks in the selection of the Party's nominee. In any event it is too late in the day to restrict the voting apportionment requirement of the Constitution to discriminations involving discreet races, sexes, or age groupings.

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[2] Nor does the other of the twin goals, "party organization and morale", justify the malapportioned formula. The national convention is a dual-purpose operation, the "primary function" being the nomination of a Presidential and Vice Presidential candidate. But it also has secondary "pep-rally" functions—party organization and morale. Arrangements at the convention for this secondary function are a matter within the National Committee's discretion. See, e.g. *Lynch* v. *Torquato*, 343 F. 2d 370 (3d Cir. 1965). And most, if not all, of the questions of morale and organization can be handled within this framework. Whether this should be worked out through a system of "non-voting delegates," as the District Court suggested (Transcript at 18), or by designating two kinds of delegates (limiting one class to voting for President and related matters), is for the National Committee to decide. Possibly there are other ways to meet the organizational, fund-raising, morale, and like needs of the Party. But the one function of the convention that requires a rational basis for allocation is the nominating function and that rational basis has not been supplied by respondents.

3. Apart from the "electoral success" argument, the Opposition offers an attack upon "past Presidential voting" as the formula for allocation of delegates to a party's Presidential nominating convention.[3] Of course, even if a particular norm is rejected, that would not save the validity of respondents' challenged formula. We find it incomprehensible how the alleged difficulty in identifying Democrats validates the present formula, which distributes the majority of the votes not at all on the basis of Democratic allegiance but by Electoral College strength. Furthermore, the

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[3] Respondents misstate petitioners' contention when they argue (p. 17) that petitioners' formula is predicated on prior Democratic voting. As stated in the petition (pp. 22-23), "Petitioners' constitutional standard is allocation of delegates on the basis of *Democratic Party strength* in each State and the District of Columbia. Because the Democratic National Committee has itself measured Democratic Party strength (the 46 percent) by the average Democratic vote in three past Presidential elections, and because petitioners deemed that a rational and reasonable method of measuring Democratic strength, petitioners accepted that as the method of measurement. But that method of measuring Democratic strength is not an immutable constitutional norm; petitioners' proposed constitutional standard is Democratic Party strength and the method of measuring such strength may vary. For example, if the infusion of younger voters could somehow create a distortion by widely varying the pre-existing percentages of party adherence in the different states, this could certainly be an appropriate consideration for modifying a measurement formula based on one or more past Presidential votes."

Respondents' suggestion (p. 8) that petitioners "dubbed their proposal 'one-Democrat, one-vote' " in "a rhetorical effort to come within the rationale of this Court's 'one-man, one-vote' legislative reapportionment decisions" is equally fallacious. The phrase actually comes from respondents; it appears throughout the February 19th meeting of the Democratic National Committee and indeed was utilized by respondents' counsel there (DNC Transcript at 65).

Committee is in a poor position to attack the viability of a test of Democratic allegiance which it has itself adopted for 46 per cent of the delegate distribution. If the past Presidential voting test is good enough for the 46 per cent Democratic allegiance factor, and if the Constitutional error is the failure to make Democratic allegiance the basis of the entire delegate distribution, it seems clear that the test is good enough for that purpose as well. And as we noted in the Petition (p. 23, n. 11), that test having been qualified by the Party to take account of special situations, it is sufficiently flexible to permit special adjustment in 1972 for new voters enrolled under the 26th Amendment.

4. The Opposition notes that the delegate selection process in some of the states begins this January and therefore urges prompt resolution of the question before the Court. Respondents' action in taking the full 30 days to prepare their Opposition is hardly consistent with their suggestion of expedition by this Court. Furthermore, the earliest dates when the final selection of delegates will be completed in any State are February 12 (Arizona) and March 7 (New Hampshire). Moreover, current procedures make it possible for any state to adjust its delegate voting totals right up to Convention time without any serious problem or disruption.[4]

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[4] In any case where a state loses delegate votes by a new apportionment plan, the state party could apportion the total number of votes equally among the elected delegates so that each delegate would vote an equal and fractional part of the whole vote. This procedure will be used in 14 states under the existing provisions of the Call to the 1972 Democratic National Convention adopted by the Democratic National Committee on February 19, 1971. When states have fewer than 20 votes, the Call

Nevertheless, in the spirit of cooperation with the respondents' suggestion of urgency, we move for expedited consideration of the petition and merits of this case. We can file our brief on the merits two weeks after the ruling on the petition for certiorari and argue the case three days after the filing of respondents' brief on the merits. We respectfully submit that this case is clearly one which requires this Court's authoritative disposition on the merits and are prepared to assist the Court in any expedited schedule which it deems appropriate.

Respectfully submitted,

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permits them to select a full 20 delegates and apportion the total votes among them equally. If a state gains delegate votes by a new apportionment plan, the elected delegation could itself choose the additional delegates as permitted by the Democratic National Committee in comparable circumstances.